No. 12517

In the United States Circuit Court of Appeals for the Ninth Circuit

HARVEY L. CARIGNAN, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

J. EARL COOPER,
United States Attorney
Anchorage, Alaska
Attorney for Appellee

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12517

HARVEY L. CARIGNAN, Appellant
vs.
UNITED STATES OF AMERICA, Appellee

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement as to jurisdiction set forth in the Brief of Appellant is correct.

STATEMENT OF THE CASE

Appellant was indicted in the District Court for the District of Alaska, Third Division, for the crime of murder in the first degree, under Section 65-4-1, A.C.L.A., 1949. The indictment contained one count and charged that on or about the 31st day of July, 1949, at or near Anchorage, Alaska, Third Judicial Division, Territory of Alaska, appellant was engaged in an attempt to commit the crime of rape by forcibly and against her will attempting to carnally know and ravish one Laura A. Showalter, a woman, and that the appellant, while engaged in the attempt to commit such rape, by his actions killed Laura A. Showalter by beating her about the head and face with his fists.

This indictment was returned on the 12th day of October, 1949 (R.1). Thereafter and on the 14th day of October, 1949 appellant was brought before the court, and upon stating to the court that he had no money with which to pay counsel, Bailey E. Bell and James E. Weir were appointed and entered as counsel for the appellant (R.3). On October 15, 1949 Bailey E. Bell withdrew as co-counsel for appellant, and Harold J. Butcher was appointed and entered as co-counsel (R.4).

Appellant was arraigned on October 17, 1949, at which time the hour of 9:30 A.M. on October 24, 1949 was set as the time for appellant to enter his plea or otherwise move against the indictment (R.5). Appellant entered a plea of not guilty to the crime charged in the indictment on October 24, 1949 (R.6).

Thereafter appellant was tried by a jury and convicted of the crime of murder in the first degree as charged in the indictment (R.59). His motion for a new trial was denied (R.66). Subsequently, on the 20th day of December, 1949 the court pronounced the death sentence. This appeal followed.

STATEMENT OF FACTS

While the appellant's brief contains a Statement of Facts, it is deemed advisable to set forth a statement in this brief which more closely reflects the facts contained in the record and which is consistent with the verdict of the jury.

On the evening of July 31st, 1949 between 9:00 and

9:30 P.M. a Mr. Henry A. Keith passed by the vicinity of Ninth and A Streets on his way home. As he proceeded down A Street he noticed in the tall grass on his left a man and woman lying in the grass (T.T.P. 133). Mr. Keith paused briefly and the man rose up and told him to go on. There was no further conversation. The woman appeared to be lying still. Mr. Keith also observed at this time a red shoe lying in the street. He further noticed some children playing in the alley, one of whom had a bicycle (T.T.P.135). Leading from the spot in question to the road there appeared to be a swath or trail where the grass had been broken down, as though someone had been dragged over the grass. There were also what appeared to be heel marks at the side of the road (T.T.P.152). Mr. Keith proceeded on home and at approximately 6:00 o'clock the next morning, while on his way to town, he was curious about the incident the night before and paused briefly while passing the same vicinity, at which time he noticed a naked person lying in the identical spot in which he had seen the couple the previous evening. Mr. Keith immediately reported the matter to the police and together with them, returned to the scene.

At a subsequent date at a police line-up, Mr. Keith identified the man as the appellant, Harvey Carignan, and also at the time of giving his testimony in court pointed him out (T.T.P.137). Upon investigation, the officers discovered the partially clad body of a woman. There was a hat found near the scene with fresh blood stains on it (T.T.P.159), a red shoe in the

street and another one near the body, a pair of bifocal glasses. The glasses and shoes were identified by Mrs. Reddick, who knew Laura Showalter in life and who recognized the articles as being similar to those belonging to the victim (T.T.P.198).

Captain Barkdoll of the police force, who also investigated the scene of the crime that morning, stated that the body resembled that of a woman he had known in life as Mrs. Showalter, and there was contained in a small coin purse removed from the body, an identification of Mrs. Laura Showalter (T.T.P.205). There was also a social security card with the name Showalter on it (T.T.P.341).

The hat found at the scene was later identified by a witness, Kellner, as a hat identical to a hat worn by the appellant on the night of the murder, and a hat which had been previously seen on Carignan at the barracks where the appellant and the witness lived (T.T.P.285-289).

A pair of pants which had been borrowed from one Corporal Miller by the appellant the night of the murder was not directly returned to Miller, but when he next saw them, they had been sent to the cleaners and returned. It was indicated by the witness Martens, who is manager of a local cleaning establishment, testifying from his records, that Carignan had sent a pair of pants of that description to his place of business on August 1st (T.T.P.294-305).

At a later date, on the 16th of September, 1949, the appellant Carignan accompanied one Peterson, a

member of the C.I.D., to the city police station in connection with the investigation of assault with intent to commit rape on one Christine Norton. At that time the suspicions of the police were aroused as to the similarity of that case and the Showalter case, and the United States Marshal was advised accordingly (T.T.P.231).

At approximately 4:00 or 4:30 P.M. on September 16, 1949 a Deputy United States Marshal arrested the appellant, charging him with the crime of assault with intent to commit rape on Christine Norton, following which he was immediately arraigned before the United States Commissioner (T.T.P.231).

On the 19th day of September appellant gave a written statement to the U. S. Marshal Paul Herring (T.T.P.310), which statement was introduced at the trial over the objection of the appellant. Following the execution of this written statement, appellant also made certain oral admissions and voluntarily accompanied the officers to the scene of the crime, where he identified the scene and made certain other statements relative to his participation in the crime (T.T.P.338).

Following commission of the crime the appellant proceeded to Fourth Avenue, where he got a cab and proceeded to the railroad tracks at the edge of Fort Richardson, where he got out and walked to his barracks. (T.T.P.338). Upon arrival at the barracks his shirt was missing (T.T.P.338). Also, at the time of his arrival, his clothes were messed up and he had blood on him (T.T.P.384).

According to the affidavit of Dr. James E. O'Malley, who performed the post mortem on the body of the victim, she had been badly beaten, the nose had been shattered and fragments of the bone which make up its bridge were freely movable, the muscles on both sides of the head were found to be very bloody and bruised, and the skull was fractured. The primary cause of death was that of skull fracture, with a rupture of the middle meningal arteries. (T.T.P.366-368).

ARGUMENT

FIRST POINT: 1. THERE WAS NO ERROR IN THE INDICTMENT RETURNED BY THE GRAND JURY IN FAILING TO PROVIDE AND NAME THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

It is submitted that there is no merit to the contention raised by appellant under this point. Formerly under **Section 101, Title 48, U.S.C.** the provision reads as follows:

> There is established a district court for the Territory of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * *

However, it will be noted that Section 101 was subsequently amended by the enactment of **Public Law, June 25, 1948, Chapter 646, Sec. 9, 62 Stat. 986,** in which amendment we find the following language:

> There is established a district court for the **DISTRICT OF ALASKA,** with the jurisdiction of district

> courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * * (Emphasis supplied).

It is therefore submitted that the caption set forth in the indictment is the correct caption under the law. However, if it were determined that the caption should be "District Court for the Territory of Alaska" rather than "District Court for the District of Alaska," it would result merely in a matter of error in form rather than substance and would come under the provision of **Rule 52 (a), Federal Rules of Criminal Procedure,** which provides that any error, defect, irregularity or variance which does not affect **substantial rights shall** be disregarded.

It will be further noted that in the body of the indictment the term "Territory of Alaska" is used.

In **Lowrey** v **U.S.,** 161 F.2d 30, C.C.A.8, at page 35, we find:

> Failure of an indictment to state the county of the state where the offense was committed does not make the indictment fatally defective under the **Federal Rules of Criminal Procedure, 18 U.S. C.A.** following Sec. 687. Against a motion to dismiss, it is sufficient that the indictment show that the offense was committed within the territorial jurisdiction of the court before which the indictment was returned.

The indictment in this case meets that test.

SECOND POINT: 2. THE COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR TRANSFER OF THE CASE TO ANOTHER JURISDICTION ON THE GROUNDS OF IMPOSSIBILITY TO HAVE A FAIR TRIAL IN THE THIRD DISTRICT COURT AT ANCHORAGE AS A RESULT OF LOCAL PREJUDICE.

In contending that the court erred in refusing to transfer this case on the grounds of prejudice, appellant states that it was impossible to draw a jury from the residents of the Anchorage area who would not be prejudiced against appellant, calling attention to various newspaper articles and radio broadcasts relative to the crime. This question was determined by this court in the case of **Shockley** v. **United States,** 166 F.2d 704, CCA 9. Part of the opinion of Justice Bone in that case is quoted:

> Page 709.
>
> Motions by appellants for a change of venue on the ground of local prejudice which made a fair trial impossible, were denied. See Rule 21, Rules of Criminal Procedure. An application of this character is addressed to the sound discretion of the trial court. (Cases cited). Venue is fixed by law. A proper showing and strict conformity with the statute are essential to a proper exercise of the power of the court to transfer the proceedings to another district or division. (Cases cited). * * * An attack was made by appellants on local newspaper and radio publicity given the Alcatraz prison break, but, as pointed out in **People** v. **Brindell,** 194 App. Div. 776, 185 N.Y.S. 533, 536, "If

> newspaper articles furnished ground for removal, no defendant could ever be tried in this county for a spectacular crime."

In **Kersten** v. **U.S.,** 161 F.2d 337, C.C.A.10, the same question arose. The following is quoted from the court opinion at page 339:

> Kersten filed a motion to transfer the proceedings to another district under Rule 21(a) of the **Federal Rules of Criminal Procedure.** He attached to the motion, copies of news items appearing in the Denver Post and the Rocky Mountain News, newspapers of general circulation throughout the District of Colorado, and copies of newscasts from Denver radio stations whose broadcasts reach all parts of the District of Colorado. * * * The motion was verified, and averred that the news items and newscasts had created such a prejudice against Kersten in the District of Colorado that it would be impossible for him to have a fair and impartial trial by a jury drawn from such District. It was also supported by affidavits. The United States introduced counter affidavits. The trial court denied the motion. A motion for a change of venue is addressed to the sound discretion of the trial court and, in the absence of an abuse of discretion, the denial of the application is not error.

The foregoing case was cited with approval by the Court of Appeals, District of Columbia, in **Dennis** v. **U.S.,** 171 F.2d 986.

The trial court, in the instant case, followed the same line or reasoning as set forth by the court in

U.S. v. Eisler, 75 Fed. Supp. 634, in the District Court for the District of Columbia, in which case a motion was made pursuant to the provision of **Rule 21, Federal Rules of Criminal Procedure,** on the grounds that there existed in the District of Columbia so great a prejudice against the defendant that he could not obtain a fair and impartial trial therein. In its opinion, at page 638, the court states:

> It is the view of the Court that the publication of the newspaper articles referred to were presumably made in newspapers in the Southern District of New York as well as in the District of Columbia and they should have no effect upon the trial of the case, whether held in the District of Columbia or in the Southern District of New York, and it is not to be assumed that they will have any. The effect of such published articles on the executive order referred to in the motion upon anyone called to serve as a juror in this case is only speculative and cannot be dealt with until an examination of those called for service as jurors reveals whether or not a jury can be secured, no member of which is or is likely to be influenced thereby.
>
> For these reasons the motion for transfer upon the first ground is denied without prejudice to a renewal of the motion on this ground at the trial if and when it appears that a fair and impartial jury cannot be secured.

It will be observed that upon examination of the jurors as to their qualifications to serve, in many instances the prospective jurors had gone no further than to scan the headlines. Others who had read the

newspaper articles had not formed any definite impressions (T.T.P.23-126). In view of appellant's contention on this point, it is rather interesting to note that two of the prospective jurors, Mr. Curtis (T.T.P.37-38) and Mary Ethel Price (T.T.P.56-58) were never questioned relative to the newspaper articles and radio broadcasts. It will be further noted that Juror Bertha Meier was excused by the court as being a friend of the victim (T.T.P.100), Florence Tibbs was likewise excused on the basis of entertaining an opinion (T.T.P. 103), Fred Moellendorf was excused on the basis that he knew the victim (T.T.P.111)), and Lionel Haakenson stated that as a result of the newspaper articles he had formed an opinion which he could not lay aside, and he was excused by the court (T.T.P.112-113).

It is obvious that those who had formed an opinion or for some reason entertained some doubt as to whether they could be fair jurors, frankly made that fact known to the court and accordingly were excused. An examination of this entire question refutes appellant's contention that it would be impossible for any juror to escape impressions from the newspaper articles.

Appellant makes considerable point of the examination of the juror, Mrs. Kauffman, and appellant lifts from the context one or two expressions used by Mrs. Kauffman as a basis for citing error on the court's part in refusing to grant his challenge. However, when her answers, taken as a whole, are examined, it is revealed that the court did not abuse its dis-

cretion in denying such challenge. We find the following expressions on the part of Mrs. Kauffman supporting the court's ruling: she stated that she could presume innocence (T.T.P.77); that she did not have an opinion either way (T.T.P.80); that if she were on trial or was representing the prosecution she would be willing to have one in her frame of mind sit as a juror (T.T.P.81); that she understood the presumption of innocence (T.T.P.82); that she had no opinion and is now able to presume innocence (T.T.P.83); and that she had no ideas which would prevent her from being impartial (T.T.P.84).

Section 66-13-37, A.C.L.A., 1949 provides as follows:

> **Challenge for actual bias.** That a challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 66-13-35. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror can not disregard such opinion and try the issue impartially.

The court certainly did not abuse its discretion in this respect.

A similar matter came before the 7th Circuit Court in **Arnold vs. U.S.**, 7 F.2d 867 on almost identical facts. The court stated at page 869:

> The competency of jurors is primarily a matter within the discretion of the court. (Cases cited). Nothing is disclosed which indicates that by this ruling the court's discretion was transgressed.

The contention on the part of appellant that individuals in Alaskan communities have a greater interest in local affairs than is the case in larger communities in the states proper, that newspapers of Alaskan communities are read more avidly than elsewhere, and that feelings, emotions, interests and sides are more readily developed than elsewhere, are pure assumptions on the part of appellant, not based on evidence or fact, have no place in appellant's brief, and should not be considered by this court.

In view of the foregoing it is obvious that the jury as finally empaneled was fair and impartial and without prejudice or bias.

THIRD POINT: 3. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS ON THE GROUNDS THAT HE HAD NOT BEEN GIVEN A PRELIMINARY HEARING AND WAS DENIED THE RIGHT OF COUNSEL, WHILE HELD IN CUSTODY DURING THE PERIOD UP TO HIS ARRAIGNMENT ON THE INDICTMENT.

In his argument under this assignment of error appellant states that he had been arraigned on the 16th day of September by the authorities and charged with assault with intent to commit rape on one Christine Norton and was taken before the United States Commissioner and Ex-Officio Justice of the Peace, where a preliminary hearing was held and the defendant in-

formed of the charges against him and advised of his rights (Appellant's Brief, p. 11).

We agree with that statement of facts. However, an examination of the testimony refutes the contention of the appellant that he was secretly interrogated from the 16th to the 19th of September in connection with the death of Laura Showalter. He was at no time under any restraint concerning the death of Laura Showalter prior to the 12th day of October, when he was formally charged with the crime set forth in the indictment. Obviously, then, he was not being held in connection with the charge contained in the indictment and there was no necessity for a preliminary hearing. As a matter of fact, there was no charge pending upon which a preliminary hearing could have been based.

Appellant advances a rather novel argument in connection with this point and cites **Federal Rules of Criminal Procedure, Rules 5(a) and (b).** This rule has no application whatever to the circumstances in the instant case. It is not contended that upon his arraignment in connection with the Christine Norton case the defendant was not advised of his rights to have counsel and to the rights accorded a defendant charged with a crime. Nor is it contended that he was not immediately taken before a magistrate upon his arrest in the Christine Norton case. To the contrary, the evidence reflects that he was immediately taken before the Commissioner following his arrest in that case.

The crime upon which he was held, that is, assault with intent to commit rape, was a bailable offense, and he was free to go at any time he furnished such bail. All of his rights were fully accorded under the law at the time of his arraignment under the indictment charging him with murder, and not until such arraignment can it be argued that he at any time was restrained in connection with the crime charged in the instant case.

The fact that a person may be proceeded against in the first instance by indictment, without going through the formality of a complaint, arraignment and preliminary hearing, is so obvious as not to require argument. And while it is not too clear as to whether these particular circumstances presented themselves in the case of **Goldsby v. U.S.,** 160 U.S. 70, that fact can be inferred from the language of the court at page 73:

> The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guarantee to be confronted by the witnesses, by mere statement demonstrates its error.

So it is a proper conclusion that the defendant at no time was under any illegal restraint.

Appellant's further contention under this point that he was exposed to long, secret interrogation by the police authorities is contrary to all the facts appearing in the trial proceedings. This particular question, however, will be discussed at further length under Point 6 raised by appellant.

FOURTH POINT: 4. IT IS DENIED THAT THE VERDICT IS NOT SUPPORTED BY THE EVIDENCE.

Inasmuch as appellant has treated assignment 4 and 8 together, they will be so treated in this brief, and as to the

EIGHTH POINT: 8. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE GOVERNMENT RESTED ITS CASE, ON THE GROUNDS THAT THE MATERIAL ALLEGATION OF THE INDICTMENT HAD NOT BEEN PROVED.

Appellant contends that the element of attempt to commit the crime of rape was entirely and wholly missing from the government's case (Appellant's Brief, p. 13).

While it is true that there was no direct evidence adduced at the trial establishing the fact that the appellant was engaged in an attempt to commit rape upon Laura Showalter at the time she met her death, nevertheless there were established ample facts and circumstances from which logical inferences to that effect could be drawn, and such logical conclusions are reflected in the verdict rendered by the jury.

The following facts were established: the position in which the witness Keith saw the appellant and his victim on the night of July 31, 1949—that of a man and woman lying in the grass (T.T.P.138); the pathway leading from the road to this particular spot having

the appearance of a body or object having been dragged over the grass (T.T.P.153); the heel marks or what appeared to be heel marks in the road (T.T.P.153); the nude condition of the body testified to by several witnesses (T.T.P.159, 202), all point to the crime of rape.

It will be further noted that according to defense witness Evans, on the evening in question the appellant had attempted to make a date with a middle aged woman who was an accordion player at the Scandinavian Bar where they were drinking (T.T.P.378, 379). That the appellant had definite sexual propensities was established by the defense itself on cross examination of witness Herring (T.T.P.359). And a careful examination of the entire record will reflect that any mention made with reference to the trial and conviction of appellant some time earlier of the assault with intent to commit rape upon Christine Norton was brought out by the defense itself.

The fact that a small diamond ring and gold nugget ear rings were found on the body (T.T.P.41), coupled with the fact that very shortly prior to the incident in question the appellant had received the sum of approximately $30 for the exchange of a gun that he had bought a short time previously (T.T.P.378, 399), ruled out any question of robbery being the motive.

All of these factors, when taken together, lead inevitably to the logical conclusion that the appellant attempted to rape his victim at the time she met her death. This is the only conclusion that can be arrived at when considered in the light most favorable to the

government, the test applied in cases on appeal. The question of intent usually, of necessity, must be established by inferences drawn from circumstances and proven facts.

Appellant next complains that the body of the victim was not identified as that of Laura Showalter. However, here again the facts refute that contention. A red shoe in the street and another near the body and a pair of bifocal glasses were identified by the witness Mrs. Reddick, who knew Laura Showalter in life, as being similar to those belonging to the victim. (T.T.P.198). Captain Barkdoll of the police also recognized it as the body of the woman he had known in life as Mrs. Showalter. There was discovered on the body of the victim a small coin purse in which an identification of Mrs. Showalter was found (T.T.P.205). There was also a social security card with the name Showalter on it (T.T.P.341). An examination of the affidavit of Dr. O'Malley reveals that the body upon which he performed the autopsy was that of Laura Showalter (T.T.P.366). And as stated in the court's opinion as set forth in Appellant's Brief at page 14, there was sufficient evidence concerning the identity for the matter to go to the jury. All of this evidence, however, was subsequently supplemented by the introduction of a standard death certificate of Laura Showalter (T.T.P.402, 403).

FIFTH POINT: 5. THE COURT DID NOT ERR IN REFUSING TO PERMIT APPELLANT TO TAKE THE STAND AND TO TESTIFY AS A PRELIMINARY MATTER ON THE ADMISSIBILITY OF THE CONFESSION.

The court did not err in refusing the appellant the right to take the stand and to testify as a preliminary matter as to the admissibility of the confession. The witness Herring first talked with the appellant on the 17th day of September relative to making a statement, at which time appellant asked to see a priest. A priest was secured for him, and he and appellant had a conversation for approximately an hour, following which appellant agreed to make a statement. This statement was not made on the basis of questions and answers, but, to the contrary, the appellant requested and was given a pad of paper and pencils and, at his own desire, was placed in a cell by himself, at which time orders were given that he was not to be disturbed. He was further informed that after writing this statement he could tear it up if he did not wish to give it.

On Monday morning the appellant was again contacted by Marshal Herring, at which time he said that he had a statement prepared and expressed once again the desire to see the priest, and once again the priest was called and spent approximately an hour to an hour and a half with appellant.

Following this second visit of the priest, the appellant made the remark that there was nothing in it, referring to the statement. The statement, however, was

furnished and accounted for his activities until approximately 9:00 or 9:15 in the evening of the day of the crime. At this time he made the remark to the effect that he was afraid to put the rest of it down for fear he would not be believed and for fear that his neck would stretch. However, after a brief interview, Carignan agreed to write down the rest of the story. Upon surrendering this statement he was informed that he could still destroy it if he wished. No promises had been made to the appellant and he was never at any time threatened, but on the contrary, was treated in a humane and courteous manner (T.T.P.310-313).

Upon offer of the statement in evidence, counsel for appellant requested and was permitted to cross examine the witness Herring relative to admissibility of the statement. On cross examination, Herring's testimony was, in effect, as follows: that he had met Carignan on the Saturday afternoon of the 17th. At this time, together with Officer Miller, Carignan was advised of his rights. He told him that he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired. At no time did appellant question him with respect to getting counsel (T.T.P.316-318). During the time that they were together, the appellant went into a discussion of his background. The appellant never, at any time, refused to make a statement (T.T.P. 319-320).

The first interview by Marshal Herring was concerned with the story of his early life (T.T.P.321). On

Sunday Marshal Herring stopped by the jail to see how Carignan was getting along. However, there was merely a brief exchange of greetings between the two on that occasion (T.T.P.324).

The appellant was re-interviewed by Herring on Monday, the 19th of September. At this time, in the presence of Officers Miller and Barkdoll, appellant was asked if he wished to give a statement, to which he replied no, that he wished to see the priest first. (T.T.P.326). After his visit with the priest and at the suggestion of Officer Barkdoll, the latter and Officer Miller left the room. Barkdoll had not attempted to get a statement from him nor, according to Herring's recollection, had Officer Miller (T.T.P.327).

Carignan had previously stated on several occasions that he had the fear that his neck would stretch, to which statements Herring replied that he could not promise him anything, but there had not been a hanging in this Division in 27 years. But as to what would happen to him, he could not promise. He made no promises that he would attempt to get his charge reduced. He did not threaten him that if he did not cooperate his neck would stretch. He did admit that Miller might have told the appellant that he, Herring, might be of some influence in helping him (T.T.P. 328). On one occasion when Carignan was in the office of Marshal Herring, his attention was attracted to a portrait, at which time the statement was made to him by Herring that he wondered what his Maker would think of him for doing this. He also stated that his Mak-

er might think more of him if he told the truth (T.T.P. 329). This was the only conversation relative to the religious pictures (T.T.P.330).

Herring did not tell him that he was well known by the authorities at McNeil Island nor that if he went to McNeil Island he might be of benefit in getting him a responsible place. He did not tell him that he was in a position to help men who went there.

Upon conclusion of the cross examination of Herring, a request was made by counsel for appellant to put Carignan on the stand and examine him on the circumstances surrounding the taking of this statement. This offer was denied by the court, and the statement was admitted in evidence.

It will be noted that both direct and cross examination relative to the admissibility of the statement were made in the presence of the jury without any objection by appellant. The statement itself, for the most part, dealt with the general activities of the appellant during the day in question. Near the close of the statement, however, he admitted hitting a woman in the nose and the next thing he remembered was sitting and hitting a woman in the face with his fists, and upon realizing what he was doing, he wanted to run and get away from there. The statement concluded by saying that Marshal Herring had made no promises or threats and that he believed he needed medical attention and should receive it before being allowed to go out in public. (T.T.P.337).

Following admission of the statement, the witness Herring continued to testify relative to oral admissions by the appellant which went much further in connecting him with the crime than did the written statement. Testimony concerning these matters was made without any objection on the part of counsel for appellant (T.T.P.338-340).

There is ample authority for the proposition that when there is a conflict as to whether the confession is voluntary, the matter should go to the jury. Had the court acceded to appellant's request and permitted him to take the stand, and had the appellant testified to facts which would have made it appear that the confession was not voluntary, he would have been in no better position than he was under the court's ruling, for under the latter circumstances, the court would still have been required to submit the matter to the jury. The law is well settled that when there is a conflict as to the admissibility of a confession, its voluntariness is to be determined by the jury.

In **Tooisgah** vs. **U.S.,** 137 F.2d 713, CCA 10, at page 716, the court in its opinion, citing the case of **People** v. **Farmer,** gives the following quotation:

> The civilized conduct of criminal trials cannot be confined within mechanical rules (Cases cited).

and goes on in its own language to say:

> Law suits are not tried by the square and compass, but by the trial judge's innate sense of justice. To be sure, he is guided by certain instru-

ments called rules, but rules measure only the boundaries beyond which the ends of justice may not be reached.

To have required the court in this instance to have permitted the appellant to take the stand on the question of the admissibility of the confession would have been tantamount to confining the court to purely mechanical rules.

It is assumed, of course, that the appellant would have requested his examination in the absence of the jury. Otherwise, he would have taken the stand in his own defense, which he did not do.

The matter of the admissibility of a confession is within the sound discretion of the court. In reviewing the circumstances under which the statement in question was made, there is not the slightest evidence that it was anything but voluntary or that it was prompted by any consideration other than that the appellant had a desire to get this awful matter off his conscience.

According to the case of **Cohen** v. **U.S.**, 291 F. 368, cited by appellant in his brief at page 19, the court declares the principle that if the testimony of the government tends to show that the alleged confession is made voluntarily in a legal sense, then no matter how heavily the testimony for the defendant as to the character of the confession may contravert that of the government, the confession is prima facie admissible as evidence.

SIXTH POINT: 6. THE COURT DID NOT ERR IN ADMITTING THE CONFESSION INTO EVIDENCE.

An examination of the record will reflect that there is not the least merit to the contention on the part of the appellant that the confession admitted into evidence was not a voluntary confession. Either the appellant is not familiar with the transcript of the trial proceedings, or he has placed an extremely strained construction upon what appears therein.

The facts as revealed by the transcript concerning the circumstances surrounding the making of the confession are set forth in the argument under the 5th Point of this brief, and nothing would be gained by repeating them here.

However, attention of the court is once again drawn to the fact that under cross examination of the witness Herring as to the admissibility of the statement and the cross examination proper, and under further direct examination without objection on the part of appellant, the witness went much further in relating admissions of the appellant than were contained in the written statement.

The appellant identified the hat in question and admitted that he got it from a buddy by the name of Conrad Sylveste, another soldier at Fort Richardson, (T.T.P.338). He voluntarily accompanied the officers to the scene of the crime and pointed out the place where he came to, pounding the victim in her face (T.T.P.339). He admitted that he had been dressed in a pair of

pants that had been dyed darker but could not account for what became of the khaki shirt which he was wearing that evening. He did retrace his steps, going over the route from the scene of the crime to his barracks at Fort Richardson, accompanied by the officers (T.T.P.340). Witness Herring further testified that at neither interview was the appellant kept later than perhaps 6:00 or 7:00 o'clock in the evening (T.T.P.357).

Counsel for appellant also elicited through cross examination various sexual aberrations on the part of the appellant. At this point the court intervened, but counsel insisted that he thought the matter was relevant (T.T.P.359). Further testimony revealed that the appellant, after leaving the Territory of Alaska, had sought a return to his army post at Adak with the thought that he might get over his abnormal sexual tendencies, and reenlisted in the army with that thought in mind (T.T.P.361). This substantiates the statement contained at the end of his written confession relative to the fact that he thought he needed medical attention before he was allowed to go out in public.

The courts seem to have applied two general principles relative to the admissibility of confessions. Under one principle, the object seems to be to exclude statements which are false because they were obtained by promises or threats or hope or fear, and that under such circumstances, the temptation to speak falsely is so great as to render the statement entirely untrustworthy. **Wigmore On Evidence,** Sec. 822.

The other principle of exclusion established by the Supreme Court in various decisions is that no person shall be compelled in a criminal case to be a witness against himself. Under the latter, it is quite possible that statements which are true might be excluded. **Wigmore On Evidence,** Sec. 823.

When these tests are applied to the confession in the instant case, it is apparent that it falls far short of coming within either one of these principles of exclusion. As set forth in an opinion by Justice Bone in the case of **Symons v. U.S.,** CCA 9, 178 F.2d 615, at page 619, 620:

> Involuntary confessions obtained by duress or threats or undue psychological pressures, and voluntary confessions obtained after the detention has become illegal, are equally inadmissible in the federal courts. (**McNabb** v. **United States** 318 U.S. 332 and **Upshaw** v. **United States,** 335 U.S. 410) * * *

The cases cited by appellant are not controlling here because the facts in those cases in no wise are similar to the facts with which we are here concerned. There is no disagreement about the general statement of law contained in those cases, however.

In **Pass** v. **U.S.,** CCA 9, 256 F. 731, at page 732 the court declares:

> The mere fact that Pass was in custody when he made the statements and that they were answers to questions put by the agents did not make such admission involuntary. In **Bram** v. **United States,** 168 U.S. 532, cited by defendant, the facts were

very different. There the accused was in actual custody, was stripped of his clothing, and was nagged and told by the detectives that an eyewitness charged him with guilt, and that if he had an accomplice he should say so, and not have the blame of the "horrible crime" on his own shoulders. In **Hopt. v. Utah,** 110 U.S. 574, the court, in discussing the admissibility of a confession, said:

"The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely foreborne to mark with absolute precision the limits of admission and exclusion. **Sparf v. United States,** 156 U.S. 51."

It has been repeatedly held that the mere fact a defendant is in custody will not render the confession inadmissible. **Young, et al., v. Territory of Hawaii,** 9th Cir., 163 F.2d 490; **U.S. v. Marshall,** 322 U.S. 69; **Lyons v. Oklahoma,** 322 U.S. 601; **Ziang Sung Wan v. U.S.,** 266 U.S. 1.

Nor does this case come within the rule laid down in **Watts v. Indiana,** 338 U.S. 49 cited by appellant. The same is true in the case of **McNabb v. U.S.,** supra. It is submitted that the appellant is in error in contending that in the McNabb case the defendants were taken promptly before a magistrate, for the substance of the ruling in that case is that the confessions were improp-

erly admitted because of holding and interrogating the defendants without carrying them forthwith before a committing magistrate as the law commands. It may be further pointed out that in the McNabb case the situation was aggravated by continuous questioning for many hours by numerous officers.

Nor do the circumstances surrounding the confession in the instant case fall within the strict rule laid down in the case of **Upshaw v. U.S.**, supra, which apparently is the latest expression by the Supreme Court on this question.

There is no basis whatever for appellant's contention that the confession by the appellant was procured by prolonged and continuous secret interrogation, promises, inducements and psychological pressure.

The appellant is dealing in considerable speculation in attempting to place an inference upon the words of Mr. Herring that Officer Miller probably made promises to the appellant. As stated in **Morton v. U.S.**, 147 F.2d. 28, at page 31:

> * * * Skilled lawyers, advised by their clients, make their decisions upon these questions, in view of their familiarity with the facts and the law. It is not the function of appellate courts to retry cases upon the intangibles involved in evidence which might have been, but was not, introduced at the trial.

Both Officer Miller and Officer Barkdoll were under subpoena by the government and were available to

be called in behalf of appellant, had he been serious in the contention which he now makes.

The contention that there was psychological pressure exercised by virtue of calling the appellant's attention to certain religious plaques in the office of the Marshal, as set forth on page 21 of appellant's brief, is another example of lifting expressions from the context, for an examination into that matter will reveal that the incident concerning the religious plaques was to the effect that the witness Herring asked Carignan if he knew who the portrait on the wall was, followed by the statement that he wondered what his Maker would think of him for doing this, and that his Maker might think more of him if he told the truth about this (T.T.P.329).

And that was the extent of any conversation relative to the religious plaques. It amounted to no more than a solicitation to tell the truth, which has been determined by the courts as not being an improper inducement to render objectionable a confession thereby obtained unless threats or promises are applied. **Martin** v. **U.S.**, CCA 4, 166 F.2d 76, 79. **Murphy** v. **U.S.**, CCA 7, 285 F. 801, at page 811, states:

> The expressions, "better tell the truth" and "better be frank" and "it will be best for you to tell the truth" have been before the courts on many occasions, and the majority have held them not sufficient to defeat the admission of the confession.

A mere hope of lighter punishment not based on

definite promises is not sufficient to render a confession inadmissible. **U.S. v. Lolardo,** 67 F.2d. 883, at page 885, Judge L. Hand states as follows:

> The authorities are so many and so varied that we are of necessity confined to those in the federal courts which alone are authoritative for us. The leading case is **Bram v. U.S.,** 168 U.S. 532 * * * In spite of the court's treatment of those decisions as a safeguard * * * we do not believe that it meant to commit itself to the doctrine that the mere hope of a lighter punishment shall exclude a confession.

There is no presumption against a confession. **Gray v. U.S.,** CCA 9, 9 Fed. 2d 337. At page 339, Judge Gilbert in his opinion states:

> It is the rule in the federal courts that the fact that a confession is made by an accused person, even while under arrest, or when drawn out by the questions of an officer, does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. **Murphy v. United States,** 285 Fed. 801, 807; **Sparf v. United States,** 156 U.S. 51; and **Perovich v. United States,** 205 U.S. 86, 91.

This same point is made in **Hartzell v. United States,** 72 F.2d. 569, in which case certiorari was denied, 298 U.S. 621. At page 577 of that decision Judge Gardner in treating upon this question, says:

> In the federal courts there is no presumption against voluntary character of a confession, and

the burden is not on the government in first instance to show its voluntary character. Citing **Gray** v. **United States** 9 F.2d, 337; **Wigmore On Evidence,** 2nd Edition, Sec. 860.

Certainly, the mere fact that the appellant was confined at the time is not a sufficient reason for contending that the confession was not voluntary. **Evans** v. **U.S.,** 122 F.2d 461. **U.S.** v. **Gottfried,** 165 F.2d 360, cert. den. 68 Supreme Court 738.

It is apparent from all of the facts that the trial court, in ruling upon the admissibility of the purported confession, had a right to believe that the weight of his load, and not inducements, threats or compulsion of any kind, caused the appellant to speak.

SEVENTH POINT: 7. THE COURT DID NOT ERR IN DENYING THE APPELLANT THE RIGHT TO CALL WITNESSES FOR HIS DEFENSE ON THE BASIS THAT HE WAS AN INDIGENT DEFENDANT AND HAD NO MEANS TO SECURE WITNESSES.

The appellant is obviously basing this assignment on a false premise, for the court at no time denied the appellant the right to call witnesses, but to the contrary, indicated its willingness to do so upon proper showing by the appellant as required by **Rule 17(b) of the Rules of Criminal Procedure** (T.T.P.349-353). At no time did the appellant comply with the provisions of this rule. The affidavit in question went no further than to state, "These individuals will be called upon

to testify on the behalf of the defendant and specifically to his activities as they observed them on the 31st day of July" (R.28). It is well settled that in order to take advantage of the foregoing rule, an indigent defendant must make the proper showing. In **U.S.** vs. **Best**, 76 Fed. Supp. 138, the court states at page 139:

> This motion lies within the discretion of the court. **Goldsby** v. **U.S.**, 160 U.S. 70. **Crumpton** v. **U.S.** 138 U.S. 361. Construing R.S. Sec. 878 (**28 U.S. C.A., Sec. 656**), of which present Rule 16(b) is an enlargement.

The court goes on further to state:

> With respect to named United States citizens allegedly living somewhere in the United States, there is no proper showing in defendant's motion under Rule 17(b) to warrant the court in issuing a subpoena for any of the witnesses named.
>
> The motion is denied.

While the case of **Thomas, et al.,** vs. **United States**, CCA 5, 168 F.2d 707, is not exactly in point, the court did state at page 708:

> On the main point of this nature relied on that in connection with his motion to have witnesses summoned at government expense, appellant's counsel was required to give the United States Attorney a statement as to what the testimony of each witness would be, the record is completely silent as to any complaint made below or any exception taken to the requirement. If there was error, therefore, appellants are not in a position to complain of it, but it was not error.

The ruling in that case is significant in view of the language of the court at T.T.P. page 350:

> * * * but the rule requires that he set forth what the witnesses that he wishes to subpoena will testify to. The court can't tell from an affidavit in such general language as this one whether their testimony is material or not, and the further reason for that requirement is that the United States Attorney may elect to stipulate that if the witnesses were produced, they would testify to that effect. Now, he can't stipulate to anything here. * * *

At no time did the appellant here make such a showing which could have been a basis for such stipulation.

In **Flynn** v. **U.S.**, CCA 9, 172 F.2d 12, this court was confronted with a similar question. Quoting from page 14:

> Before the date set for the trial of the case appellant made a motion for the issuance of a subpoena under Rule 17, Rules of Criminal Procedure, and for a continuance, but the court denied without prejudice. All of these motions were denied, and we think properly so.

A recent case is that of **Meeks** v. **U.S.**, CCA 9, 179 F.2d 319, which case was based on an appeal from the District Court of Alaska, Division One, Judge George W. Folta presiding, who was the same judge who sat in the trial of the instant case. The court declared as follows at page 321:

Appellant, by motion, requested the trial court to summon at government expense three witnesses, Trafton, Mathewson and Peterson. The motion was denied and appellant assigns such denial as error. Rule 17(b) of **The Federal Rules of Criminal Procedure,** 18 U.S.C.A., requires motions of this character to be supported by an affidavit containing certain information. So far as the record shows, the required affidavit was not filed although the trial court requested appellant to do so. Appellant having failed to comply with the law, the court was not required to order the issuance of the desired subpoenas. (Cases cited). The rule also gives the trial court discretion in ordering the procurement of witnesses at government expense. No abuse of discretion was shown. **Austin** v. **United States,** 9 Cir., 19 F.2d 127, certiorari denied 275 U.S. 523, and **Dupuis** v. **United States,** 9 Cir., 5 F.2d 231.

The appellant here further requested the court for an adjournment or continuance of the trial until he had an opportunity to contact the witnesses and secure the information upon which to base the necessary affidavits. The court denied this request upon the grounds that there had been no showing of diligence and that there had been no compliance with the law (T.T.P.369). It is submitted that the court's ruling on this matter was correct.

In **Goldsby** v. **U.S.,** supra., at page 72, we find:

That the action of the trial court upon an application for continuance is purely a matter of discretion not subject to a review by this court unless

it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

There is no showing here that the trial court abused this discretion in this respect.

EIGHTH POINT: 8. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE GOVERNMENT RESTED ITS CASE, ON THE GROUNDS THAT THE MATERIAL ALLEGATION OF THE INDICTMENT HAD NOT BEEN PROVED.

This assignment was covered in connection with the argument under assignment 4, supra.

NINTH POINT: 9. THE COURT DID NOT ERR IN PERMITTING THE WITNESS, GARNER, TO TAKE THE STAND IN THE GOVERNMENT'S REBUTTAL TESTIMONY.

NINTH POINT: 9(a). NO PREJUDICE WAS INSTILLED IN THE MINDS OF THE JURORS BY THE QUESTIONS ASKED BY THE UNITED STATES ATTORNEY OF THE WITNESS, GARNER.

Points 9 and 9(a) will be here considered together as was done in appellant's brief. The appellant's case consisted entirely of an attempt to establish the fact that appellant was intoxicated at the time the crime was committed (T.T.P. 374-396). It was obviously proper on the rebuttal for the government to adduce testimony as to the appellant's sobriety. This was attempt-

ed by calling the witness, Francis E. Garner, who is erroniously referred to in appellant's brief as Gardner. From the statement made by the United States Attorney (T.T.P.407), and from the questions put to the witness, there can be no doubt but that the appellee was attempting to establish the fact that appellant was sufficiently sober to recall the incident of appellant's conduct with the victim, Mrs. Showalter, on the night in question (T.T.P.412).

It is obvious from the answers given by the witness, Garner, that he either had no recollection of the conversation he had with appellant concerning this matter, or that he had become a hostile witness. It is difficult to ascertain from the answers given by Garner which of these was the case (T.T.P.407-417). From an examination of this entire question it is apparent that the appellee expected to adduce from the witness, Garner, the fact that he had had a conversation with the appellant from which conversation the appellant recalled certain incidents of the night in question which would refute any question of his intoxication. The fact that the appellee was not successful in this attempt cannot be cited as error.

In the case of **Madden** v. **U.S.,** CCA 9, 20 F.2d 289, it appears that the circumstances were similar to those involved here. At page 293 the court, in its decision, stated:

> To nearly all of the numerous questions put to him he answered he did not remember, or was not sure, or that he could not identify the person or

> the circumstance. Under these circumstances, we do not think it was error for the court to permit the government to make the attempt to show that there were such transactions as were referred to in the inquiry, and that they had to do with the operations of the Principio within the scope of the alleged conspiracy. And error is not to be predicated upon the attempt, merely because it was unsuccessful.

In **Goldsby** v. **U.S.**, supra, at page 74 the court declared:

> The government called a witness in rebuttal who was examined as to the presence of the defendant at a particular place at a particular time to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. (Cases cited).

It is submitted that the court in the instant case did not abuse its discretion in this respect.

The contention of the appellant that the attempt of the appellee to refresh Garner's recollection on the conversation in question with the appellant by asking questions concerning, and calling the witness's attention to, a statement which he had previously made in

connection with this matter, is not error. This is particularly true in view of the appellant's constantly bringing to the jury's attention the previous incident of appellant having been arrested in connection with a crime of assault with intent to commit rape on one Christine Norton, and by further eliciting from the witness Paul Herring that the appellant, during his early life, had committed certain acts of sex perversion. In view of this, the appellant certainly was not prejudiced in the eyes of the jury by the questions asked the witness Garner.

However, if it were determined that such questions were prejudicial, the error, if any, was cured by the court's striking all the questions and answers in connection with this matter and instructing the jury to disregard the entire incident (T.T.P.417).

TENTH POINT: 10. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT NO CONSIDERAION COULD BE TAKEN IN THE JURY'S DELIBERATION BECAUSE OF THE FAILURE OF THE APPELLANT TO TAKE THE STAND AND TESTIFY IN HIS OWN BEHALF.

The appellant, in the instant case, made no request for any such instruction, and it can be assumed that the trial court felt that by giving such instruction, in the absence of a request by appellant, it would be unduly drawing the attention of the jury to the fact that the appellant did not testify.

The case of **Robilio** v. **U.S.,** 291 F. 975, cited by appel-

lant, is not in point. The question there involved was relative to the improper comment by the prosecuting attorney relative to the failure of the defendant to take the stand.

In **Michael v. U.S.,** 7 F.2d. 865, cited by appellant, the defendant had requested an instruction in connection with his failure to take the stand. The court, however, in that case, went further, at page 866:

> I am not to be understood, however, as indicating to you the view that an uncontradicted fact in the case is to be looked upon by you, in view of anything which I have said on this subject in any other light than as an uncontradicted fact.
>
> * * * There seems to be a difference of opinion among the judges and the bar as to whether such reference to the accused's failure to testify helps or injures him before the jury. Some courts have gone so far as to criticize the trial judge for giving such an instruction in the absence of a request. There is always a possibility of the jury's misunderstanding the court's reference to the defendant's failure to testify, and it is entirely proper to add that which is here criticized.

In neither the case of **U.S.** v. **Wilson,** 149 U.S. 60 nor **Shay** v. **U.S.,** 251 F. 440, is the case in point, as both of those cases dealt with the question of comments by the district attorney on the failure of the defendant to testify.

In **Becker** v. **U.S.,** 5 F.2d. 45, at page 49, Judge Learned Hand includes the following language in his opinion:

> In his charge the learned trial judge, without request from the defendant, mentioned the fact that the defendants had not taken the stand. With some elaboration, he instructed the jury that no inference of guilt could be drawn from this. Becker now urges that any allusion to the fact was reversible error. **It is no doubt better, if a defendant requests no charge upon the subject, for the trial judge to say nothing about it.** (Emphasis supplied).

In the case of **Bradford** v. **U.S.**, 129 F.2d. 274, error was assigned because no instruction was given as to defendant's failure to take the stand, and the court said at page 278:

> The court below did not err in not charging the jury with reference of Will Bradford to take the witness stand in his own behalf. Bradford did not request an instruction. In this instance it was better for the court not to mention the matter.

In **Yoffe** v. **U.S.**, CCA 1, 153 F.2d, 570, at page 576:

> Appellant claims that the court erred in failing to give several instructions, although no requests for such instructions had been made. Only rarely will a trial court's judgment be reversed for failure to give instructions in the absence of a seasonable request or exception. (Cases cited). And then only if the failure to instruct constitutes a basic and highly prejudicial error. (Case cited).

Goldsby v. **U.S.**, supra, while not directly in point, does contain some persuasive language, at page 77:

> The four errors assigned as to the charge of the court do not complain of the charge intrinsically

but are based upon the assumption that, although correct, it was misleading and tended to cause the jury to disregard the testimony offered by the defendant to establish an alibi. But the charge in substance instructed the jury to consider all the evidence and all the circumstances of the case, and if a reasonable doubt existed, to acquit. If the accused wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and, therefore, the assignments of error are without merit.

Attention is also directed to **Section 66-13-51, A.C.L.A.,** 1949, Section 7:

> At the conclusion of the arguments the court shall charge the jury, which charge shall be reduced to writing by the court and a copy of such instructions shall be given to the counsel for each of the parties, plaintiff and defendant, provided, however, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to the adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. * * *

Appellant did not comply with this provision of the code.

ELEVENTH POINT: 11. THE COURT DID NOT FAIL TO ALLOW ANY TIME BETWEEN THE FURNISHING OF COPIES OF INSTRUCTIONS TO THE JURY AND THE READING OF SAID INSTRUCTIONS TO THE JURY FOR REVIEW BY APPELLANT'S COUNSEL AS TO POSSIBLE ERRORS OF LAW AND LACK OF APPROPRIATE INSTRUCTIONS, THUS HANDICAPPING APPELLANT'S COUNSEL MATERIALLY IN THE TAKING OF EXCEPTIONS TO THE INSTRUCTIONS AND THE PRESENTING OF ADDITIONAL INSTRUCTIONS.

No argument is presented by appellant under this assignment (Appellant's Brief, p. 27), nor does the record anywhere support his contention.

TWELFTH POINT: 12. THE COURT DID NOT ERR IN PERMITTING THE GOVERNMENT TO REOPEN ITS CASE TO PRESENT ADDITIONAL EVIDENCE IN CHIEF WITHOUT SHOWING GOOD REASON THEREFOR AS REQUIRED BY LAW.

While the appellant under this assignment presents no argument, it is felt that the court might be interested in a few brief remarks in that respect.

In the case of **Haugen v. U.S.**, CCA 9, 153 F.2d 850, at page 851, we find:

> After both government and defense had rested the parties briefed the question whether secondary evidence with certain facts respecting the provisions of a government contract later considered

should have been admitted. The court filed an opinion setting forth in effect that the plaintiff had failed to present the best evidence available to him and that it should have sustained the objection to the introduction of such testimony. The court went on to say that without such evidence plaintiff has failed to sustain its burden of proof that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal ticket was calculated to defraud the United States. Therefore, the action must be dismissed.

Five days later the prosecution moved to reopen the case and proposed to submit the evidence which the court stated in its opinion it seems not unreasonable to require. The motion was granted and the trial proceeded.

At page 852:

No such finding of not guilty having been made here, it was within the discretion of the trial court to reopen the case after submission by both parties.

While this was a case heard by the court in the absence of a jury, the same principles of law pertain.

In **Burke** v. **U.S.**, CCA 9, 58 F.2d 739, at page 741:

After the government rested its case the court permitted the case to be reopened and additional evidence to be introduced on the subject of variance. It is claimed that this was error. As it was a matter wholly within the discretion of the court, there is no merit in the contention.

In **Lutch, et al.,** vs. **U.S.,** CCA 9, 73 F.2d 840, the court states in its opinion, at page 841:

> There is no assignment or specification of errors set out in appellant's brief, but in an assignment of errors in the transcript of record signed by defendant's attorney it is claimed that the court erred in allowing the government to reopen its case after both defense and government had rested, in order to put in evidence that defendant William Andrews' true name was Soderstrum. There is nothing in this assignment, as it is within the discretion of the trial court as to whether the case should be reopened to receive new evidence. It was competent to show that the appellant was living under an assumed name at the time he engaged in the distilling business.

It is submitted that the trial court in the instant case did not abuse its discretion in that respect.

THIRTEENTH POINT: 13. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURORS ON THE QUESTION AS TO THE AUTHENTICITY OF THE CONFESSION AND THE METHOD BY WHICH THE CONFESSION WAS PROCURED.

There is no question but what the court is required to instruct on the whole law of the case, and we find no disagreement with appellant's citations on that point. However, in the instant case there was no occasion for the court to instruct on the admissibility of the confession in view of all the evidence concerning

the circumstances of making it and the absence of any conflicting evidence in that regard.

In **Raarup** v. **U.S.**, CCA 5, 23 F.2d 547, the court said:

> But where the confession is clearly voluntary, and there is nothing in the evidence which would justify the jury in finding otherwise, it is no error to refuse to instruct the jury that they may disregard on a finding of involuntariness.

In **Gray** v. **U.S.**, supra, the court stated at page 340:

> The court might properly, if requested by the plaintiff in error, have instructed the jury that the confession must have been voluntarily made in order to be considered by them. But no such request was made.

In **Lewis** v. **U.S.**, 9th Cir., 74 F.2d 173, at page 179, the court stated:

> The appellant has made no attempt to point out in what respects the evidence introduced before the jury concerning the involuntary character of the confession justified the submission of that question to the jury. All the references to the transcript in appellant's brief are to the evidence taken during the absence of the jury. We have, nevertheless, examined the testimony before the jury and find nothing in the evidence presented to them which would justify or require the submission of the question of the competency of the evidence of confession to the jury.

In view of the foregoing, it is submitted that the court committed no error in failing to instruct in this matter, in the absence of a request to do so.

FOURTEENTH POINT: 14. THE COURT DID NOT ERR IN FAILING TO REMOVE JURORS FOR CAUSE WHEN JURORS INDICATED THAT THEY HAD FORMED AN OPINION PRIOR TO THE TRIAL.

In appellant's statement of points relied on, at page 5 of appellant's brief, he assigns as error, failure to remove jurors for cause when jurors indicated that they had formed an opinion prior to the trial. This contention is so wholly lacking in merit that the appellant did not see fit to argue the point, and we shall therefore not consider it, with the exception of calling the court's attention to the examination of the jurors in the argument under the 2nd point of this brief.

CONCLUSION

An examination of the entire record fails to reveal any error on the part of the court which would warrant a reversal. The appellant had a fair and impartial trial and was ably represented by two attorneys. The court was fair and impartial. No legitimate reason exists for upsetting the verdict of the jury, and it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

J. EARL COOPER,
United States Attorney,
Anchorage, Alaska
Attorney for Appellee.